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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 591

ALEXANDER McDONALD,

Petitioner,

—vs.—

UNITED STATES OF AMERICA and
BETHLEHEM STEEL COMPANY,

Respondents.

BRIEF OF RESPONDENT, BETHLEHEM STEEL COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Alexander McDonald,

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BRIEF OF RESPONDENT, BETHLEHEM STEEL COMPANY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counter-Statement of Questions Presented

1. Where the District Court found as a fact that a shipowner turned a ship over to an independent contractor for deactivation repairs prior to delivery to the "moth ball" fleet, that the major part of such repairs had been completed and the ship was no longer fit for navigation, does a warranty of seaworthiness extend to petitioner who was injured on the ship under the foregoing conditions?

2. Where the District Court found as a fact that such ship had been turned over to the independent contractor and there was no supervision, direction or control by the owner

as to how, or where or by whom the work was to be done, and that sole control of such matters was in the said independent contractor, may the shipowner be held liable for negligence?

Counter-Statement of the Case

This brief in opposition to the petition for a writ of certiorari herein is filed by Bethlehem Steel Company, respondent to said petition. Bethlehem Steel Company was impleaded-respondent below, having been impleaded by respondent, United States of America. In the District Court, the libel and impleading petition were dismissed, which dismissals were affirmed by the Court of Appeals for the Third Circuit.

It has been settled by this Court that in reviewing a judgment of a trial court sitting without a jury in admiralty the appellate courts are required to accept the findings of fact made below unless they are "clearly erroneous". *McAllister* v. *United States*, 348 U. S. 19, 99 L. Ed. 20 (1954). Pursuant to this standard of review, we shall rely upon the trial court's Findings of Fact, which were expressly approved by the Court of Appeals as being "amply supported by the evidence" (P19a):

"Findings of Fact

"1. This is a libel brought by Alexander McDonald against the United States of America and American Export Lines, Inc., with respondents' claim over against Bethlehem Steel Company. Libelant claims damages for injuries which he sustained on April 1, 1959 while working on the S. S. Exochorda as a painter in the employ of Bethlehem Steel Company.

"2. On April 1, 1959 the S. S. Exochorda was owned by the Maritime Administration of the United States of America, title thereto having been acquired from American Export on March 17, 1959.

"3. Pursuant to the contract of sale the vessel was to undergo deactivation repairs and processes by American Export as agent for the Maritime Administration prior to delivery of the vessel to the Government's lay-up fleet in the Hudson River.

"4. American Export entered into a contract with Bethlehem Steel for certain repairs and work of deactivation in accordance with the contract of sale.

"5. The Exochorda's last United States Coast Guard certificate of inspection had expired on October 22, 1958 and from April, 1958 until March 16, 1959 the ship had lain idle at Pier B in Hoboken, N. J. without a crew, and with her boilers shut down.

"6. On March 16, 1959, without steam or power of her own, and without a crew, the Exochorda was towed to Bethlehem Steel's shipyard in Hoboken, N. J., where it remained in dry dock from March 16, 1959 to March 20, 1959 for performance of repair and deactivation work.

"7. On March 20, 1959 she was refloated and moored alongside one of Bethlehem Steel's piers, where the work was continued until April 1, 1959.

"8. In addition to ordinary repairs, deactivation work has been carried on, including the following: the vessel's stern tube was disconnected and filled with preservative; her tail shaft was secured to prevent the turning of the propeller; her sea chests and all underwater overboard discharge lines were permanently

blocked off; one shot of chain was disconnected from both the port and starboard anchor chains; the shaft alley drain well was cleaned out; the ship's gangways were stowed in a lower hold; the life boats were removed and stowed in a lower hold; the radar scanner was dismantled, and all storage lockers were permanently sealed off.

"9. During the repair work Bethlehem Steel furnished shore power for permanent lights in the midship house and provided portable basket lights for illumination in cargo holds.

"10. On April 1, 1959 the major part of repairs and work of deactivation had been completed and the ship was no longer fit for navigation.

"11. Libelant was employed by Bethlehem Steel as a painter and had been so employed for ten years prior to April 1, 1959.

"12. At 7:30 A.M. on April 1, 1959 the libelant, a fellow employee, Screen, and their painting supervisor, Kessel, boarded the Exochorda to finish up some paint work.

"13. Libelant and his companions proceeded first to the laundry on C deck by way of a well-lighted stairway.

"14. After examining the completed work in the laundry, libelant decided to go to the fore peak to finish some paint work started the previous day, telling Screen to go with him. They were accompanied by Kessel.

"15. As testified to by Bethlehem Steel's job superintendent, the customary route to the fore peak from the laundry was to proceed to the main deck by way of the lighted stairway and then from there to the fore peak.

"16. Libelant, instead of going by way of the customary route, walked along athwartship passageway and turned through another passageway leading to the #3 hold for the purpose of reaching a ladder leading to the main deck.

"17. On the previous day libelant had followed this latter route, going from the laundry to the forward peak. At that time the hatches on the main deck were open and the #3 hold was illuminated by daylight and by temporary lights installed by Bethlehem Steel. All the hatch boards in the deck of the #3 hold were in place and libelant walked across them to reach the ladder leading to the main deck.

"18. On the 1st of April, 1959, #3 hold was dark, the main deck hatches having been sealed on the previous night by Bethlehem Steel workmen and the temporary lights having been removed by Bethlehem Steel men, The only light in the hold came from a single bulb in the ceiling of the passageway leading to the hold.

"19. Libelant, followed by Screen and the supervisor Kessel, entered the #3 hold without flashlights and proceeded to the hatchway in order to reach the ladder to the main deck.

"20. Two hatch boards had been removed from the square of the hatch during the previous night by employees of Bethlehem Steel, pursuant to orders of the Bethlehem Steel job supervisor, Cavanagh, conveyed by the Bethlehem Steel yard night supervisor.

"21. As libelant was about to step on the uncovered part of the hatchway, Screen seeing the opening, called out a warning.

"22. Libelant fell into the lower hold and suffered severe injuries. He was later removed, being placed on a litter rigged by Bethlehem Steel employees.

"23. At the time of the accident American Export had a master, chief mate, and engineer aboard for the purpose of inspecting work done by Bethlehem Steel to insure compliance with the work specifications.

"24. In addition there was a Maritime Administration inspector aboard for the same purpose.

"25. American Export maintained gangway guards to prevent pilfering. These guards had no power of supervision of the work done by Bethlehem Steel, nor did they participate in any of the work done aboard the ship.

"26. There was no supervision, direction or control by the Maritime Administration as to how, or where or by whom the work was to be done, sole control of such matters being in Bethlehem Steel.

"27. There is no evidence that any work was done on orders of the Maritime Administration's representative or the representative of its agent American Export Lines (267a-270a)."

ARGUMENT

POINT I

The decision of the Court of Appeals that no warranty of seaworthiness extended to petitioner was manifestly in accord with prior decisions of this Court, and does not warrant further review.

In *West* v. *United States*, 361 U. S. 118, 4 L. Ed. 2d 161 (1959), this Court unequivocally held that "there could be no express or implied warranty of seaworthiness to any person" at work aboard a vessel which is "not in maritime service", but "undergoing major repairs and complete renovation * * *." (361 U. S. at 122.) While *West* on its facts concerned a vessel undergoing reactivation work at the time of the petitioner's injury, the Court made it clear that its holding was not limited to that particular situation. In distinguishing the line of cases previously extending the warranty to shore-based workers (e.g., *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 90 L. Ed. 1099 (1946)), Mr. Justice Clark pointed out that those decisions had involved vessels which, "*instead of* undergoing general repairs, were in *active maritime service*" at the times of the injuries. (Emphasis added.) (361 U. S. at 121.) This juxtaposition of concepts leaves no doubt that a drydocked vessel which is "undergoing general repairs" at the hands of an independent contractor is *ipso facto* removed from "active maritime service", without particular regard to the ultimate purpose of those repairs.

The instant case presents the factual converse of *West*. Here the vessel had been handed to an independent contractor for deactivation rather than reactivation, and petitioner below, as here, made much of the factual variation.

Both the Court of Appeals and the District Court, looking to the undisputed facts concerning "the status of the ship" at the time of petitioner's injury (see *Roper* v. *United States*, 368 U. S. 20, 22, 7 L. Ed. 2d 1 (1961)), applied the principle enunciated by *West* and consequently held that no warranty of seaworthiness existed. Petitioner has never denied, and cannot deny, that at the time of his injury the vessel was undergoing major and extensive repair work which had almost been completed. Yet he continues to insist that this case is beyond the pale of the *West* doctrine, essentially because the vessel here was being deactivated rather than reactivated.

While we frankly cannot comprehend the logical thrust of petitioner's thesis of distinction, it seems clear that the Court's reasoning in *West* applies with equal force to a claim of warranty involving a vessel in the process of deactivation. *West* plainly indicated that the ultimate objective of the contractor's work (e.g., reactivation, deactivation, etc.) is not controlling, but bears upon whether it would be "unfair * * * to say that the owner held the vessel out as seaworthy * * *." (361 U. S. at 122.) And if, as *West* held, it would be "unfair" to impute a representation of seaworthiness to a shipowner who engages a contractor for the very purpose of rendering the ship seaworthy, how is it any fairer to impose that responsibility upon a shipowner who hires a contractor for the express purpose of making his vessel *unseaworthy*?

In any event, the precise question raised by petitioner was before this Court when it refused to review the decision of the Fourth Circuit Court of Appeals in *Noel* v. *Isbrandtsen Company*, 287 F. 2d 783 (4th Cir. 1961), *cert. den.* 366 U. S. 975, 6 L. Ed. 2d 1264, 81 S. Ct. 1944 (1961). In that case, as here, the injury occurred aboard a vessel which was in the process of being deactivated

for layup in the "mothball fleet". The work had not been completed. In rejecting a claim of unseaworthiness, the Court, through Chief Judge Sobeloff, said:

> "The defense here to the action for unseaworthiness is that in the circumstances the warranty is not applicable. From West v. United States, 1959, 361 U. S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161, we learn that in determining this question we are to look to the status of the vessel at the time of the accident. In West the vessel had been taken from the 'moth ball' fleet to the shipyard for major overhaul in preparation for return to service; it had not yet been readied to resume service. In the present case the vessel had actually been withdrawn from service and delivered to the shipyard to prepare her for return to the 'moth ball' fleet, and she was no longer available to perform ship's service. In both cases the vessel was out of navigation when the injury happened. The William Bevan was a 'dead ship' because she was no longer in service. The changes made in her at the shipyard are merely evidence under the particular circumstances that her sailing career had been effectually terminated. In this sense she was 'dead.' A body is not less dead in the interval between expiration and interment, while it is still in the hands of the embalmer."

This application of *West*, with its attendant holding that the deactivation work need not have been completed to render the vessel a "dead ship", is absolutely dispositive of petitioner's claim here. See also *Latus* v. *United States*, 277 F. 2d 264 (2d Cir. 1960), *cert. den.* 364 U. S. 827, 5 L. Ed. 2d 55, 81 S. Ct. 65 (1960).

Petitioner also tries to evade *West* by pointing to the express warranty of seaworthiness running contractually

from American Export Lines to the United States at the time when the vessel was sold. He argues that because of this warranty, it would not be "unfair", as in *West*, "to say that the owner held the vessel out as unseaworthy" (Pb 10).

It is immediately apparent that the "owner" of the vessel at the time of the injury was the United States, the *recipient* of the contractual warranty, and that in any event a contractual warranty of this type surely would not extend to third persons such as petitioner. But even if such basic logical obstacles to petitioner's reasoning did not exist, it is clear that the *West* doctrine applies as pertinently to claims of express warranty as to claims of implied warranty. Here, while the ship was warranted to the Government as "seaworthy" at the time of the sale, the contract required Export after the sale, as a term and condition thereof, to have the vessel deactivated for layup in the "mothball fleet", i.e., to have the vessel rendered *unseaworthy* (Ex. L-2, 226a). *Noel* v. *Isbrandtsen Company, supra.* Bethlehem, as Export's contractor, and petitioner, as Bethlehem's employee, were doing precisely that when petitioner was injured. Under *West*, there can be no "*express* or implied warranty of seaworthiness" owing to a person whose very work objective contradicts the notion that the owner holds the vessel out as seaworthy to those performing the work (361 U. S. at 122).

Petitioner's quest for review stands or falls upon the proposition that this case, involving the factual converse of *West*, somehow requires the adoption and application of legal principles different than those set forth in *West*, and implemented by *Noel* and *Latus*. While his petition is replete with irrelevancies, including a frank plea to penalize the "deep pocket" simply because it is there (Pb 11),

petitioner has not, and cannot, set forth a single cogent basis of differentiation. The holdings below were absolutely faithful to the doctrine of *West* v. *United States*, and should not be disturbed.

POINT II

The decision of the Court of Appeals with respect to petitioner's claim of negligence was predicated on a factual finding by the District Court which was more than amply supported by the evidence, and should not be disturbed.

On the negligence aspect of petitioner's claim, the Court of Appeals squarely applied the holding of *West* that a shipowner who turns his vessel over to an independent contractor for general repair work to be accomplished by methods of the contractor's own selection, reserving only the right to inspect and approve the work as it progresses, has no obligation to protect the contractor's employees from hazards inherent in the performance of the contract (361 U. S. at 123). The District Court had found the facts of this case to come well within the ambit of that basic rule, and the Court of Appeals held the finding to be amply supported by the evidence. *McAllister* v. *United States*, *supra*. Again, therefore, we have little to say except that this case is manifestly controlled by *West* v. *United States*, *supra*, with respect to petitioner's negligence claim as well as his claim of entitlement to a warranty of seaworthiness.

Notwithstanding the determinations below that possession and control of the vessel had been relinquished to Bethlehem at the time of the injury, petitioner appears to contend that the obligation of American Export Lines as General Agent under NSA Order No. 64 to prepare the

specifications and to be responsible for their satisfactory execution created some sort of "non-delegable" duty to ascertain that the contractor's work was performed safely. But it has been settled by this Court that in the field of maritime negligence law, there is no magic in the existence of a General Agency Agreement whereby a private shipper acts as the Government's agent in matters which do not in fact involve possession and control of the vessel as those terms are ordinarily understood. *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783, 93 L. Ed. 1692 (1949); *Caldarola* v. *Eckert*, 332 U. S. 155, 91 L. Ed. 1968 (1947). The great weight of the evidence here, including the quoted testimony upon which petitioner relies (Pb 14-15), clearly demonstrates that the responsibility of American Export Lines as General Agent was limited to inspection of Bethlehem's work in order to ascertain whether it was being performed satisfactorily in accordance with the specifications. It is settled that such activity does not amount to the type of possession and control which entails a corresponding duty to actively police the contractor's manner of performance of the details of the work to determine whether it is being done with safety to those involved. *West* v. *United States, supra; Latus* v. *United States, supra.* American Export's function as General Agent was "to inspect the work in progress to determine whether it was proceeding according to specifications, not to make minute examinations into the means by which the independent contractor was carrying on its work." *Allen* v. *United States*, 178 F. Supp. 21, 27 (E. D. Pa. 1959). The evidence unequivocally so indicates, and petitioner points to no language in NSA Order No. 64 which required American Export to control Bethlehem's method of performing its contract.

Petitioner relies on the unreported opinion of Judge Meaney (also trial Judge herein) in the case of *Finley* v. *United States*, filed June 9, 1959, Civil Action No. 326-57. There, as petitioner states, the United States as owner "did not simply limit its participation to seeing if the job complied with the contract" (Pb 14). As Judge Meaney found in *Finley*, the Government kept on the job site a Marine Surveyor whose word, according to the testimony, "was law". He also found in that case that the United States was represented by a "repair representative" "in charge of the work". In the instant case, contrary to his Finding in *Finley*, the same trial Judge found as fact that there was "no supervision, direction or control by the Maritime Administration as to how, or where or by whom the work was to be done, sole control of such matters being in Bethlehem Steel" (Findings of Fact, No. 26), and that there was "no evidence that any work was done on orders of the Maritime Administration's representative or the representative of its agent, American Export Lines" (270a). *Finley* is therefore clearly distinguishable from this case in the crucial area of Findings of Fact, and the evidence supporting them.

CONCLUSION

For the reasons set forth above, it is respectfully urged that this case is absolutely controlled in fact and in law by the decision of this Court in *West* v. *United States* and that the petition for certiorari should therefore be denied.

Respectfully submitted,

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